the labor organization affected is affiliated with a labor organization national or international in scope. * * *

* * * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order * * *. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. * * * Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board * * *.

U. S. GOVERNMENT PRINTING OFFICE: 1957

more than an "Edgar Bergen-Charlie McCarthy" situation. The voice of the dummy is in reality the voice of the master. There is no process by which the dummy could ever be transformed into a vital union; hence, it should be forever removed from the scene.

The Board also attempted to justify its "unless and until" certified order by its practice from the earliest days. The practice grew up under the Wagner Act. That Act did not deny the processes of the Board to any "labor organization." That Act did not contain anything resembling Section 9 (f), (g) and (h) of the Labor Management Relations Act of 1947, as amended.

Furthermore, the ordinary cease and desist order of that period was effective for a very short period of time: "As a matter of practice, the Board permitted the union to petition for an election within 60 days of such determination." CCH Labor Law Reporter, 4th Ed., Vol. 2, p. 3965, par. 3595.

In continuing the use of the same order after the passage of the Labor Management Relations Act of 1947, as amended, the Board did not take into account the realities of the situation. Under the old Wagner Act, prior to the amendments, neither the employees nor the union selected by them were adversely affected. Under the new Act, such an order adversely affects the union. It amounts to a denial to the employees of the full freedom of choice of their bargaining agent and denies to the chosen labor union the right to represent such employees.

E. The Order of the Court Was Appropriate

Section 10 (e) and (f) gives United States Courts of Appeal power to "enter * * * a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board." The Act contains no limitation upon the manner in which the Courts of Appeal may modify such orders. If the order is too broad, the court may narrow it. If the order is too narrow, the court may broaden it.

The petitioner urges that the court should have remanded the case in order that the Board might re-draft its order. The United States Courts of Appeal are not conducting a course in advanced composition. Litigation would be indefinitely prolonged if the court had to remand, the Board rewrite, the litigant take a second appeal, the court remand again, the Board try its hand at composition again and the litigant again petition for review. The Attorney General appoints a Commission to cure the law's delay; the Board suggests a procedure which would increase that delay. If the procedures advocated by the Board should be followed, the courthouses of the United States should have added to their structures a wailing wall against which those drawn into litigation might bemoan their fate.

The petitioner complains that the court below erred in eliminating all references to the Teamsters' Union. Congress established the National Labor Relations Board in order that it might secure to employees full freedom of choice and designation of their representatives. The Board was not established in order to influence that choice.

Where the order of the Board is susceptible of being construed to prefer the Teamsters' Union, the elimination of this preference hurts nobody. It does not deprive the Teamsters' Union of any right given it by the Act. It places no penalty upon that union. It promotes free selection by the employees.

The matter complained about seems too trivial to invoke the jurisdiction of this court. Surely it is not necessary for this court to pinpoint multitudinous little decisions in order for the lower federal courts to plot the course which they should follow.

CONCLUSION

For the foregoing reasons we respectfully submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

CRAMPTON HARRIS
1018-19 First National Building
Birmingham 3, Alabama
Counsel for District 50,
United Mine Workers of America

YELVERTON COWHERD
900-15th Street, N.W.
Washington 5, D. C.

ALFRED D. TREHERNE
900-15th Street, N.W.
Washington 5, D. C.

Of Counsel for District 50
United Mine Workers of America

APPENDIX

1. Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,887

DISTRICT 50, UNITED MINE WORKERS OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Petition for Review of Order of National Labor Relations Board

---

No. 12,950

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BOWMAN TRANSPORTATION, INC., RESPONDENT

Petition for Enforcement of an Order of the National Labor Relations Board

---

Decided October 4, 1956

Mr. E. Crampton Harris, with whom *Messrs. Velverton Cowheid* and *Alfred D. Treherne* were on the brief, for petitioner in No. 12,887.

Mr. Frederick U. Reel, Attorney, National Labor Relations Board, of the bar of the Supreme Court of Wisconsin, *pro hac vice*, by special leave of Court, with whom

Messrs. Theophil C. Kammholz, General Counsel, National Labor Relations Board, *David P. Findling*, Associate General Counsel, National Labor Relations Board, and *Marcel Mallet-Prevost*, Assistant General Counsel, National Labor Relations Board, and *Mrs. Nancy M. Sherman*, Attorney, National Labor Relations Board, were on the brief, for respondent in No. 12,887 and petitioner in No. 12,950. *Mr. Robert G. Johnson*, Attorney, National Labor Relations Board, also entered an appearance for respondent in No. 12,887 and petitioner in No. 12,950.

No appearance for respondent in No. 12,950.

Before PRETTYMAN, WILBUR K. MILLER and WASHINGTON, Circuit Judges.

WILBUR K. MILLER, *Circuit Judge:* The National Labor Relations Board petitions for enforcement of its order which requires Bowman Transportation, Inc., an interstate trucking company, to cease and desist from certain unfair labor practices, and to redress them by taking the prescribed affirmative action. Bowman Transportation has not complained of the order and did not appear here. But District 50, United Mine Workers of America, which had been chosen by the Bowman employees as their exclusive bargaining representative but has not been certified as such by the Board, petitions us to review and set aside three paragraphs of the order by which it feels aggrieved.

The background of the Labor Board's order and its essential features may be quickly sketched. In November, 1952, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, Local No. 612, undertook to organize Bowman's employees and established a picket line at its main terminal in Gadsden, Alabama. The Teamsters' efforts, opposed by the company, were unsuccessful but were still in progress, at least to the extent of the picketing which a state court first enjoined but later permitted, with violence

and disorder forbidden, when another labor organization appeared on the scene in May, 1954.

The president of Bowman called a meeting of all employees for May 22, after having been told by some employees they wanted a contract, and after having conferred with organizers for District 50. The meeting was largely attended. Those present voted unanimously to be represented by District 50 and most of them signed authorization cards, whereupon Bowman recognized that union as the bargaining representative and entered into a contract with it.

Because of these events, the General Counsel of the Labor Board charged Bowman with several unfair labor practices. After a hearing the Board found: (1) that Bowman discriminatorily discharged driver Gross and removed driver Lackey from his regular run because of their activities in behalf of Teamsters, thereby discouraging membership in that union, an unfair labor practice within the meaning of § 8(a)(3) of the Act; (2) that Bowma interfered with the administration of District 50 and contributed support to it and so engaged in unfair labor practices within the meaning of § 8(a)(2) of the Act; and (3) that Bowman interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in § 7 of the Act, and thereby engaged in unfair labor practices within the meaning of § 8(a)(1) of the Act.

Upon these findings, the Board ordered Bowman to cease and desist from: 1(a) the unfair labor practices found by it; 1(b) interfering with, restraining or coercing its employees in the exercise of their statutory rights; and from

> "[1](c) Giving effect to the collective bargaining agreement, dated May 22, 1954, between the Respondent and District 50, United Mine Workers of America, or to any extension, renewal or modification

thereof, or any other contract agreement between the Respondent and the said labor organization which may now be in force;

"[1](d) Recognizing District 50, United Mine Workers of America, as the representative of its employees for the purpose of dealing with the Respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until the said labor organization shall have been certified as such representative by the Board."

The portion of the order requiring affirmative action directed Bowman to offer reparations to drivers Gross and Lackey, and to

"[2](c) Withdraw and withhold all recognition from District 50, United Mine Workers of America, as representative of its employees for the purpose of dealing with the Respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until the said labor organization shall have been certified as such representative by the Board."

The order also required Bowman to post prescribed notices.

May 11, 1955, before enforcement of the order had been sought, District 50, which had not theretofore been a party to the proceeding, filed with the Board an application to modify the order by striking therefrom paragraphs 1(c), 1(d) and 2(c), which we have reproduced above. The application was denied by the Board.

Part of the background of the Board's order is the fact that the Teamsters union had theretofore filed the information and affidavits described in § 9(f), (g) and (h) of the Labor Management Relations Act, 1947, while United Mine Workers of America, the parent union of District 50, has not filed thereunder. Teamsters was and is therefore eligible to be certified as the bargaining

representative of Bowman's employees if it were chosen by them, but District 50, though chosen, may not be certified so long as its parent is in a state of non-compliance.

That Bowman had engaged in the unfair labor practices found by the Board clearly appears from the evidence. It was appropriate to order, as the Board did, that the employer correct its discriminatory treatment of drivers Gross and Lackey, and that it cease and desist from giving effect to its contract with District 50, which was unfairly arrived at through Bowman's illegal assistance to that union. In those respects the order should be enforced.

This leaves for consideration paragraphs 1(d) and 2(c) of the order which direct Bowman to cease and desist from recognizing District 50 as the bargaining representative, and to withdraw and withhold such recognition, "unless and until the said labor organization shall have been certified as such representative by the Board." District 50's attack on these portions of the order raises the question whether the Labor Board has authority to forbid an employer to recognize or contract with a labor organization chosen by its employees as their exclusive bargaining representative so long as the union remains uncertified as such.

We hold the Board does not have such authority. In *United Mine Workers of America* v. *Arkansas Oak Flooring Co.*, 351 U. S. 62, 71-2 (1956), the Supreme Court observed that there is no statutory provision to the effect that a non-complying union "may not represent an appropriate unit of employees if a majority of those employees give it authority so to do." The Court went on to say:

> ". . . Likewise, there is no statement precluding their employer from voluntarily recognizing such a noncomplying union as their bargaining representa-

> tive. Section 8(a)(5) declares it to be an unfair labor practice for an employer 'to refuse to bargain collectively with the representatives of his employees, *subject to the provisions of section 9(a).*' (Emphasis supplied.) Section 9(a), which deals expressly with employee representation, says nothing as to how the employees' representative shall be chosen. See *Lebanon Steel Foundry* v. *Labor Board*, 76 U.S. App. D. C. 100, 103, 130 F. 2d 404, 407. It does not make it a condition that the representative shall have complied with § 9(f), (g) or (h), or shall be certified by the Board, or even be eligible for such certification."

In footnote 8, 351 U. S. at 72, the Court noted that "A Board election is not the only method by which an employer may satisfy itself as to the union's majority status."

In a recent case somewhat similar to this one,[1] Chief Judge Parker of the Fourth Circuit discussed the *Oak Flooring* opinion and said:

> ". . . If a cease and desist order were proper under the circumstances of the case, it should have been couched in language which would not have precluded representation of the employees by District 50 if chosen by a majority to represent them after all effects of any unfair labor practice had been eliminated." . . .

We adopt the language just quoted as applicable to this case. Paragraphs 1(d) and 2(c) are therefore improper and should not be enforced in their present form, since they preclude District 50 from representing the employees in the future, even though hereafter they should choose it in an atmosphere and a situation entirely free from the influence of unfair labor practices. There should be added, at the end of each of those paragraphs, the words "or shall have been freely chosen as such by a

---

[1] *District 50, United Mine Workers of America* v. *National Labor Relations Board and Pittsburgh Valve Co.* v. *National Labor Relations Board*, 234 F. (2d) 565, 571 (4th Cir. 1956).

majority of the employees after all effects of unfair labor practices have been eliminated."

With paragraphs 1(d) and 2(c) amended in the manner indicated above, and with the slight changes in the notice to be posted by the company which will hereinafter be suggested, we think the order will achieve the Board's proper objective, which is to eliminate the effects of Bowman's unfair labor practices so as to place Teamsters, District 50, employer and employees *in statu quo ante*, and to forbid and guard against future unfair practices by the employer, so that thereafter the employees and any and all unions concerned may work out the representation problem, untrammeled by any outside influence. When this objective has been reached, and if the employees then want a bargaining representative, they will be in a position to choose one in any manner which clearly indicates their desire. They may select non-complying District 50, or complying Teamsters, or any other complying or non-complying Union, and the employer must recognize their choice. The only limitation is that, if the Board conducts an election, District 50 will not be on the ballot. Amended in the manner we have indicated, the order will be enforced.

There still remains, however, the necessity of deciding when the ill effects of Bowman's past practices have been removed. Certainly, one effect of Bowman's unfair labor practices is removed by requiring the offer of reparation to the two drivers. Another is eliminated by striking down the present contract, unfairly arrived at, between Bowman and District 50. The possibility of continuing effect is guarded against by ordering Bowman (1) to cease and desist from the labor practices found to be unfair; (2) to refrain in the future from engaging in those or any other unfair practices; and (3) to post notices for 60 days that, in obedience to the Board's order, it will make the required amends and will not in the future interfere in any way with the

organizational efforts of any union, or with the employees' exercise of the rights guaranteed to them by law.

We think that, 60 days after the notices have been posted, it may reasonably and safely be assumed that normalcy has been restored by the Board's corrective order. Thereafter, if a Board election should be required and if the employees should therein select Teamsters or some other complying union as bargaining representative, the matter would be at an end. But, if in an election the employees should reject any and all candidates, or if no election is held, and if the employees should designate District 50 as their choice, that union will become the bargaining representative.

The form of notice to be posted by the company should be modified so as not to be inconsistent with this opinion. Moreover, the notice should not indicate that the Board prefers Teamsters. We suggest that references to that union in the Board's form of notice are susceptible of being construed as so indicating, and might better be omitted so that the company's pledges of non-interference will apply to all labor organizations. We attach as an appendix what we regard as a proper notice.

The order under review will be amended in the manner set forth in the foregoing opinion. As so amended, the order will be enforced.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO A DECREE

of the United States Court of Appeals for the District of Columbia Circuit, enforcing an order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT discourage membership in any labor organization of our employees, by discharging or refusing to reinstate any of our employees, or in any other manner discriminating in regard to their hire or tenure of employment, or any term or condition thereof, because of their activity in behalf of or membership in such labor organization.

WE WILL offer to Welch Gross, upon his application, immediate and full reinstatement in his former position or in one substantially equivalent, without prejudice to any seniority or other rights and privileges he previously had, with back pay from the date of his discharge to the date of his reinstatement.

WE WILL offer assignments to Joe Lackey, upon his re-employment, the equivalent to those he had before he was removed from his regular run.

WE WILL NOT interrogate our employees concerning their activities in behalf of any labor organization in a manner which constitutes interference, restraint or coercion in violation of §8(a)(1) of the Act, and we will not engage in surveillance of our employees at labor organization meetings.

WE WILL NOT interfere with the formation or administration of any labor organization or contrib-

ute financial or other support to any such organization.

WE WILL NOT give effect to our agreement, dated May 22, 1954, with District 50, United Mine Workers of America, or to any other contract or agreement with District 50 which may now be in force, since the National Labor Relations Board has held that the contract was brought about through unfair labor practices.

WE WILL NOT recognize District 50 as the bargaining representative of our employees, unless and until it shall have been certified as such representative by the National Labor Relations Board, or shall have been selected as such by a majority of our employees at a time at least 60 days later than the date of this notice.

All our employees are free to become, remain, or refrain from becoming, members of any labor organization, except to the extent that this right may be affected by agreements made in conformity with § 8(a)(3) of the National Labor Relations Act, as amended.

BOWMAN TRANSPORTATION, INC.
(Employer)

Dated ..... By .....
(Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

WASHINGTON, *Circuit Judge*, dissenting: I am constrained to disagree with the court's action in modifying the Board's order.

I. Section 10(c) of the Labor Management Relations Act of 1947, 29 U.S.C. § 160(c) (1952), authorizes the

Board, when it finds that an unfair labor practice has been committed, to "cause to be served on such person [committing the unfair labor practice] an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action . . . as will effectuate the policies of this subchapter."[1] These policies include, among others, the elimination of unfair labor practices by employers and unions, and the protection of the employees' right to designate a bargaining representative of their own choosing, as expressed in Section 9(a) of the Act.

It seems quite clear that a provision prohibiting an employer from recognizing a union unfairly controlled or supported by the employer until that union has been certified as the bargaining agent of the employees would in many cases be an important factor in purging unfair labor practices. In remedying such practices the Board has long inserted a provision of that sort in its orders. Even stronger action has sometimes been taken by the Board, and the Supreme Court has supported it. For example, employer-dominated unions have on occasion been ordered completely disestablished, with Supreme Court approval. *National Labor Relations Board* v. *Falk Corp.*, 308 U.S. 453 (1940); *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U.S. 514 (1941); *Labor Board* v. *Link-Belt Co.*, 311 U.S. 584 (1941). And in a case where the employer had assisted union A, the Board ordered him to deal exclusively with union B (a rival), even though before the order was issued the Board had been advised that a majority of the employees wished to be represented by the assisted union. The order was upheld. *International Association of Machinists* v. *Labor Board*, 311 U.S. 72 (1940). In view of these precedents, the Board may surely take a less stringent course, and in an

[1] The subchapter referred to is that titled "National Labor Relations," which deals generally with the Labor Board, its powers, procedures, and jurisdiction.

appropriate case order non-recognition by the employer of the assisted union as long as it remains uncertified. As to unions complying with the filing provisions of the Act, that conclusion would seem beyond question. As Chief Judge Parker said in *District 50, United Mine Workers* v. *National Labor Relations Board*, 234 F.2d 565 (4th Cir. 1956):

> "... the form of order here entered [similar to that in the instant case] would be appropriate if applied to a union which had complied with the filing provisions of the Labor Management Relations Act ...."

The question here, of course, is whether the fact that a union has not complied with the filing provisions of the Act, and refuses to comply, entitles it to special treatment by the Board. The Ninth Circuit has answered this question in the negative.[2] Yet the decision of the majority here, and of the Fourth Circuit in the *District 50* case, is to the contrary. The holding is—in substance and effect—that the Board cannot as a matter of law apply to a union which has not complied with the filing provisions of the law, the very condition which it could rightfully apply to a complying union. I find no basis in principle for giving a non-complying union an advantage which complying unions do not have. In practice to do so may encourage unions not to comply with the Act.

Mine Workers v. *Arkansas Oak Flooring Co.*, 351 U. S. 62 (1956), relied on by the majority, simply holds that non-compliance by a union with Section 9(f), (g), and (h) of the Act does not open the door to the state courts to

---

[2] See National Labor Relations Board v. Wemyss, 212 F.2d 465 (9th Cir. 1954), where the assisted union had not complied with Section 9(f), (g), or (h) (see p. 470), and where the court held that the assistance given warranted issuance of "an order that the employer withdraw recognition from the favored organization unless and until it is certified by the Board after a fair election." (p. 472)

take action against the union that they would not otherwise be able to take. As I read that decision, it was intended to preserve and protect the authority of the National Labor Relations Board, not to undermine and weaken it. It can hardly be interpreted as holding that noncompliance by a union prevents the National Labor Relations Board from taking action which it is authorized to take against a *complying* union, and which the Act itself permits. It is true that the Supreme Court's opinion declares that "no consequences other than those so-listed [in the Act] shall result from noncompliance." 351 U. S. at 73. But the context of this statement indicates that the Court was referring to consequences apart from those sanctioned by the Act itself. "Elimination of the Board [as a forum or resort by any union not complying with the filing provisions of the Act] does not, however, eliminate the applicability of the National Labor Relations Act, as amended . . . ." *Id.* at 74.

2. The principle is now well established that the Board, and not the courts, is primarily charged with the responsibility of determining what provisions are best included in Board orders to carry out the policies of the Act. "The particular means by which the effects of unfair labor practices are to be expunged are matters 'for the Board not the courts to determine' . . . We give considerable weight to that administrative determination. It should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric Co.* v. *Labor Board*, 319 U. S. 533, 539-40 (1943), citing *International Association of Machinists* v. *Labor Board*, 311 U. S. 72 at 82 (1940); *Labor Board* v. *Link-Belt Co.*, 311 U. S. 584 at 600 (1941). The majority has not suggested that the Board's order does not effectuate the policies of the Act or that it was not intended to do so. Nor, as I view the case, could such a conclusion fairly be reached.

Concededly, if District 50 or its parent organization persists in refusing to file the required statements and affidavits, the Board's order will effectually preclude the employer from recognizing and contracting with District 50 as the employees' bargaining agent, even though the employees continue to favor it. But this restraint on the employees' freedom of choice is in part due to the attitude of the union, which has chosen not to comply with Section 9. Furthermore, if the Board properly concludes that the certification of the union in the normal way is necessary to dissipate the effect of the unfair labor practices, the order would tend to assure—rather than deny—the freedom of choice guaranteed by the Act by removing improper restraints on the employees. See *International Association of Machinists* v. *Labor Board*, 311 U. S. at 82; *H. J. Heinz Co.* v. *Labor Board*, 311 U. S. at 522.

The Board stated here that the disputed provision of its order was included "To remedy the effect of the illegal assistance to the FMW," and further that:

> "By its Order, the Board is merely directing that the FMW, like any other assisted union, demonstrate that its right to be the exclusive representative of the employees involved has been established in an atmosphere free of restraint and coercion."

And with regard to its previous practice the Board stated:

> "However, in the case of an assisted but undominated labor organization, the Board has required the offending employer to withdraw and withhold recognition from the assisted union until it was certified, thus enabling the Board to assure the affected employees that their statutory right to freely choose a bargaining representative shall be preserved by conducting an election under conditions which will render such a choice possible."

It is true that the Board did not expressly consider any alternative remedies—such as conducting an investigation at a later time to determine whether the effects

of the unfair labor practices had by then been dissipated. But District 50 suggested no such alternative: it simply argued to the Board that the order was beyond the Board's power. When this argument was rejected, it appealed to this court on the same ground. As I have indicated, I think that ground is clearly untenable: in a proper case, the Board has power to enter an order of the present sort. And I think that this is such a case, and that the Board's findings were adequate to support its action—especially since it was never asked to consider any other type of action. But if this be doubted, *cf. Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608 (1946), the proper course for this court is to remand the case to the Board for further consideration. Certainly it is not within our province for us to rewrite the Board's order to choose a different remedy than it has chosen, and to direct that our new order be enforced. *See National Labor Relations Board* v. *Falk Corp.*, 308 U. S. 453 (1940); *Federal Power Commission* v. *Idaho Power Co.*, 344 U. S. 17, 20 (1952).

2. Judgment Below

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

October Term, 1956

No. 12,887

DISTRICT 50, UNITED MINE WORKERS OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

October Term, 1956

No. 12,950

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BOWMAN TRANSPORTATION, INC., RESPONDENT

On Petition for Review and on Petition for Enforcement of an Order of the National Labor Relations Board

Before: PRETTYMAN, WILBUR K. MILLER, and WASHINGTON, *Circuit Judges*.

ORDER AND DECREE

These cases came on to be heard on the record from the National Labor Relations Board and on a petition for review and a petition for enforcement of the order of the National Labor Relations Board herein, and were argued by counsel.

On consideration whereof, it is ORDERED and DECREED by the Court that the order of the Board on review herein be, and the same is hereby, modified as indicated in the opinion of this Court and, as so modified, will be enforced.

It is, therefore, ORDERED by the Court that the National Labor Relations Board shall within 10 days serve and

file a proposed enforcement decree and form a notice conforming with the views set forth in the opinion of this Court. The provisions of paragraph (1) of Rule 38 of this Court shall apply thereto.

Dated: October 4, 1956

Per Circuit Judge Wilbur K. Miller.

3. Statute Involved

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, et seq.) which are not printed in the Appendix of the Petitioner are as follows:

SHORT TITLE AND DECLARATION OF POLICY

Section 1. (a) This Act may be cited as the "Labor Management Relations Act, 1947."

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and manage-

ment which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

FINDINGS AND POLICY

"Section 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

"The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

"Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the

friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

"Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

"It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

RIGHTS OF EMPLOYEES

"SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

"UNFAIR LABOR PRACTICES

"SEC. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

"(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and has at the time the agreement was made or within the preceding 12 months received from the Board a notice of compliance with sections 9 (f), (g), and (h) and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such

labor organization to make such an agreement; *Provided further*, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

REPRESENTATIVES AND ELECTIONS

"SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.